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No. 433

In the Supreme Court of the United States

OCTOBER TERM, 1960

SUCRS. DE A. MAYOL & CO., INC., PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 166 F. Supp. 184. The opinion of the Court of Appeals is reported at 280 F. 2d 477, and is printed in Appendix A of the Petition, pp. 14–19.

JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1960. The petition for a writ of certiorari was filed on September 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that goods shipped from out-of-state to a wholesaler's warehouse do not come to rest when they are deposited by an independent trucker on the elevator or on the floor of the warehouse, but remain "in commerce," within the meaning of the Fair Labor Standards Act, until they have reached their intended destination as stock within the warehouse.

2. Whether this Court should review the finding below that petitioner failed to establish by a preponderance of the evidence that any of the employees in question met the tests established by the Administrator in the regulations, promulgated pursuant to Sec. 13(a)(1) of the Fair Labor Standards Act, to qualify for exemption as "employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman".

3. Whether the injunction restraining petitioner from further violations of the Fair Labor Standards Act with respect to its employees who are "engaged in commerce" must further specify the particular employees who are covered by the order, when the opinions below clearly indicate the classes of employees who are intended to be included.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), the pertinent

provisions of which are set forth in Appendix B of the Petition, pp. 19–20.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the minimum wage and overtime provisions (Sections 6, 7, and 15(a)(2)) of the Fair Labor Standards Act with respect to its employees who are engaged "in commerce" within the meaning of the Act (R. 3–4). Petitioner conceded non-compliance with these provisions, but denied that its operations were subject to the Act (Pet. 14).

Petitioner is engaged in the importation and distribution of hardware, paint, plumbing, miscellaneous building supplies, furniture, electrical fixtures, household equipment, and other goods, in San Juan, Puerto Rico (Pet. 14, R. 366). Its principal place of business houses its central office, a retail store and warehouse facilities, and petitioner maintains two additional warehouses (*ibid.*).

Eighty percent of the goods sold by petitioner come from the continental United States (*ibid.*). Imported merchandise arrives at the docks in packages consigned to petitioner, and is delivered to its warehouses by an independent trucker (Pet. 15). Merchandise delivered to petitioner's principal place of business is deposited by the trucker on an elevator, and one of petitioner's employees takes it up on the elevator to the third floor warehouse, where other employees receive it, open the packages, sort the goods and transport them to storerooms maintained by the various

departments (Pet. 15, R. 76, 89, 160). When the goods arrive at the appropriate department, they are checked against the invoices (Pet. 15, R. 329). Merchandise delivered by the carrier to either of petitioner's other warehouses is deposited by the trucker on the floor of the warehouse just inside the door (Pet. 15, R. 87, 89). There, petitioner's employees receive and check the goods, sort them, and remove them to appropriate storage places within the warehouse (Pet. 15, R. 137, 147), or separate and set aside merchandise designated for immediate delivery to particular customers pursuant to their previous orders (R. 137, 139, 151, 335).

The District Court held that petitioner's employees who (a) ordered, made payments for, and kept records of goods received from outside Puerto Rico; (b) operated its telephone switchboard; (c) received, checked and stored goods awaiting sale and later distribution in Puerto Rico; and (d) performed custodial and janitorial services in petitioner's office and warehouses, were engaged in commerce within the coverage of the Act (R. 366–367). The District Court also held that petitioner had failed to establish that any of these employees were exempt from the Act under Section 13(a)(1) as being employed in a bona fide executive, administrative, professional or local retailing capacity or in the capacity of outside salesman (R. 364). Accordingly, the court issued an injunction restraining petitioner from employing in violation of specified sections of the Act "any of its employees engaged in commerce, as defined by the

Act" (R. 368–369). The Court of Appeals affirmed, holding "that those employees concerned with receiving, checking, and storing goods within the warehouse," as well as the other employees who were "directly connected with these goods while they were in commerce," were "engaged in commerce" under the Act (Pet. 17), and that petitioner's objection to the form of the injunction was without merit, particularly since the "district court's supporting opinion made clear which activities were found to be covered" and defendant manifestly "understood the scope of the injunction" (Pet. 19).

The District Court rested its coverage ruling on its finding that these employees handled "merchandise received from abroad and destined for certain customers either on special orders or otherwise" (R. 362–363), and that "the evidence has established * * * that said employees performed the aforesaid operations on all merchandise received at the warehouses from time to time, be it for replenishing defendant's stock in trade or to fill special orders, or serve particular clients and that no segregation existed between one purpose or the others as regards the time devoted to each by any of the employees" (R. 364). It concluded that the evidence as to the regular and unsegregated time spent by the employees in the handling of special or "prior" order merchandise was sufficient to make it unnecessary, "under the facts of this particular case," to determine precisely where "the lawful end of the flow of the stream of commerce appears to be" (R. 363–364). The Court of Appeals rested its affirmance on

the ground that, under the principles of *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, the interstate movement of the merchandise "does not terminate simply when the destined owner takes possession" or "when the property crosses some particular threshold" but continues until "the goods have been placed in their intended destination as stock," and that "the placement of a shipment in an elevator, or on the floor by a doorway, results in only a 'temporary pause.'" (Pet. 16–17). The Court of Appeals found it unnecessary, therefore, to pass on the petitioner's contest of the trial court's factual findings with respect to special or "prior" orders (Pet. 15, fn. 1).[1]

ARGUMENT

The decision below correctly applies principles well-settled by this Court's decisions; it does not conflict, but on the contrary is in accord, with the decisions of other Courts of Appeals rendered since this Court's controlling decision in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. The *Jacksonville Paper* decision provides adequate guides for resolving the coverage question presented by the particular facts here, and this case presents no current general problem warranting further review.

1. The ruling below that the "commerce" coverage of the Fair Labor Standards Act extends to the handling of goods received from out-of-state sources

[1] In the event that certiorari should be granted, respondent would urge that the District Court's "prior orders" ruling was correct and affords an additional or alternative ground for affirmance of the decision below.

until "the goods have been placed in their intended destination as stock" within the warehouse represents a correct application of the principle established by the *Jacksonville Paper* decision, that "[n]o ritual of placing goods in a warehouse can be allowed to defeat * * * the purpose of the Act [which] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (317 U.S. at 567, 568). It is not until the goods are so placed and thus "intermingled with the mass of property" in the warehouse (*Domenech* v. *Pan American Standard Brands, Inc.*, 147 F. 2d 994, 995 (C.A. 1) (cited in the opinion below, Pet. 16), that they become a part of the stock held by petitioner "for local disposition" (cf. *Jacksonville Paper, supra*, 317 U.S. at 570).

This ruling accords with the consistent decisions of the other Courts of Appeals which have passed on this specific question since the *Jacksonville Paper* decision. *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40, 42 (C.A. 6), certiorari denied, 335 U.S. 854 (holding that "both the unloading *and storing* of goods received in interstate commerce are covered by the Act," emphasis added); *Mitchell* v. *Royal Baking Co.*, 219 F. 2d 532, 533 (C.A. 5) (rejecting the contention that the interstate movement of incoming merchandise ended when the employees received the merchandise from the carrier at the warehouse unloading platform, and ruling that the Act covered warehouse employees whose duties were to have the merchandise "checked, moved inside and spotted in the warehouse"); *Mc-*

Comb v. *Herlihy*, 161 F. 2d 568 (C.A. 4) (which reversed the district court's ruling against coverage of employees who did no unloading but only moved the goods to their storage places (see 11 Labor Cases, para. 63,218, fdg. of fact no. 2), and held that such warehouse employees "took part in the interstate movement of the merchandise since they assisted in its purchase and in its transfer from the custody of the carriers to its final destination in the partnership warehouse where the transportation from state to state came to an end" (161 F. 2d at 570)).

Most of the decisions which petitioner cites as in conflict with the holding below not only antedated this Court's *Jacksonville Paper Co.* decision, but also (with the two exceptions discussed *infra*) did not deal with the specific question here presented—they were concerned with the question whether goods remained in commerce throughout a further journey ***beyond the warehouse,*** and not with the question "where, ***within*** the warehouse, the goods come to rest" (see opinion below, Pet. 16; emphasis the court's). The only pertinent Court of Appeals decision cited by petitioner is *Walling* v. *Goldblatt Bros.*, 128 F. 2d 778 (C.A. 7), certiorari denied, 318 U.S. 757, decided before *Jacksonville Paper*;[1] and even there, as the

[1] As a subsequent Third Circuit decision pointed out, "the court in that case [*Goldblatt*] did not have the advantage of the guidance given by the Supreme Court decisions of *Walling* v. *Jacksonville Paper Company* and *Higgins* v. *Carr Brothers Company* * * *." *Walling* v. *American Stores Co.*, 133 F. 2d 840, 846 (C.A. 3).

opinion below points out (Pet. 16), "the court's attention seems to have been focused on the question of whether the goods came to rest at the warehouse, or only later at the retail stores to which they were eventually delivered", and, "[i]f the court did specifically consider the present question, it at least gave no reason why the line should be drawn at the point where the goods entered the building." And, as the court below evidently concluded, its own decision in *Walling* v. *Silver Bros. Co.*, 136 F. 2d 168, which petitioner asserts to be "directly contrary" to the decision in the instant case (Pet. 7), also did not specifically consider the present question, but was concerned with employees who handled the goods in connection with their duties to "prepare them for local shipments", *i.e.*, only *after* they had been unloaded and placed in stock in the warehouse by other employees of the company.

The only other decisions cited by petitioner which dealt with the question here at issue are those of the district court in *Mitchell* v. *C. & P. Shoe Corp.*, 14 WH Cases 241 (S.D. Fla., 1959, not officially reported) and of the Puerto Rico Supreme Court in *Ortiz* v. *Sucrs. de A. Mayol & Co.*, 78 P.R. 534. The *C. & P. Shoe Corp.* case is now pending on appeal before the Fifth Circuit, and, because its facts differ substantially from those presented here, may well be decided on different grounds on the appeal.[3] In the

[3] The *C. & P. Shoe* case involves a warehouse for a chain of stores, *i.e.*, the shoes are purchased for delivery exclusively to the warehouse's affiliated group of retail stores. The courts of appeals, following this Court's decisions in *Jacksonville*

Ortiz case, the Supreme Court of Puerto Rico relied heavily upon *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C.A. 7), certiorari denied, 321 U.S. 785, which was in effect overruled by this Court's subsequent decision in *Phillips Co.* v. *Walling*, 324 U.S. 490,[4] and, in addition, upon the mistaken view that the Administrator had rescinded his long-standing interpretation that warehouse employees "engaged in * * * the stor-

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Paper, *supra*, and *Phillips Co.* v. *Walling*, 324 U.S. 490, have consistently held that "[g]oods purchased by a chain store system outside the state, as intended stock for its various stores, are not taken out of the stream of commerce by being sent temporarily to a warehouse, as a means of facilitating their systematic distribution to the several stores in accordance with regular needs." *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766, 768 (C.A. 8); and see *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C.A. 3); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *A. H. Phillips, Inc.* v. *Walling*, 144 F. 2d 102 (C.A. 1), affirmed, 324 U.S. 490; *Montgomery Ward & Co.* v. *Antis*, 158 F. 2d 948 (C.A. 6), certiorari denied, 331 U.S. 811; *Beggs* v. *Kroger Co.*, 167 F. 2d 700 (C.A. 8).

[4] In *Phillips*, this Court noted the existence of a conflict between *Wiemann* and the First Circuit's *Phillips* decision (324 U.S. at 493), and affirmed the latter. While *Phillips* ruled specifically only on the "retail establishment" exemption (§ 13(a)(2) of the Act), it also plainly repudiated the basis of the *Wiemann* ruling against coverage, which, as is evident from the Seventh Circuit's opinion, was inextricably linked with, and rested essentially upon, the assumption that the chain's warehouses "were a part of one concern" and "a mere adjunct to the company's retail establishment" (138 F. 2d at 605). As noted by the Sixth Circuit, the *Phillips* decision "rejects the concept that a retail chain store warehouse is part of or an adjunct to a retail establishment", and "the cases exemplified by the *Phillips* decision hold [that] the wholesale activity of a chain store organization is within the stream of commerce until outside merchandise is delivered to retail stores." *Montgomery Ward & Co.* v. *Antis*, 158 F. 2d at 950, 951.

ing of the goods on the shelves or bins" within the warehouse, as well as "the checking of out-of-state goods on the unloading platform and the removal of the goods from the platform into the interior of the warehouse[,] are usually so immediately and closely connected with their receipt and unloading" as to be "engaged in interstate commerce within the coverage of the Act" (Wage-Hour Manual, 10:389 and 10:399).[5]

2. The District Court found that petitioner had "failed to establish by a preponderance of the evidence that any of the employees in question met the tests established by the Administrator in the Regulations promulgated by mandate of Congress under Section 13(a)(1) of the Act (Title 29 U.S.C.A. Sec. 213(a)(1)) to qualify as being employed in a bona fide executive, administrative, professional or local retailing capacity or in the capacity of outside salesman" (R. 364). The Court of Appeals evidently considered this finding warranted by the record, and the petition sets forth no circumstances which would call for review by this Court, particularly in the light of the well-settled principles that the burden of proof of a claimed exemption rests upon the employer asserting it (*Walling* v. *General Industries Co.*, 330 U.S. 545, 548; *Arnold* v. *Ben Kanowsky, Inc.*, 361

[5] Indeed, inasmuch as this interpretation was in effect and outstanding at the time of the enactment of the 1949 Amendments to the Act, it bears the Congressional approval given to the then-outstanding rulings by Section 16(c) of the Fair Labor Standards Amendments of 1949 (63 Stat. 920). See *Alstate Const. Co.* v. *Durkin*, 345 U.S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner* v. *Mitchell*, 350 U.S. 247, 255.

U.S. 388, 394) and that exemptions from this Act are to be "narrowly construed" (*Phillips Co.* v. *Walling, supra* 324 U.S., *supra*, at 493; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295–296).

3. Petitioner's objection to the form of the injunction, as the Court of Appeals specifically found, "is without merit" (Pet. 19). The decree fully accords with the standards recognized by this Court in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, and, as the opinion below points out, such a decree is particularly proper where, as here, "[t]he district court's supporting opinion * * * made clear which activities were found to be covered", so that petitioner was "independently advised of what the court means to include" and plainly "understood the scope of the injunction" (Pet. 19).

CONCLUSION

This case raises no problem that has not been properly resolved by the principles of this Court's prior decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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